Supreme Court, U.S.
FILED
JAN 12 2001
CLERK

No. 00-974

In The
Supreme Court Of The United States
October Term, 2000

CADLEROCK PROPERTIES JOINT VENTURE, L.P.,
Petitioner
v.
COMMISSIONER OF THE CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION AND THE CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

RICHARD BLUMENTHAL
ATTORNEY GENERAL
OF CONNECTICUT

*PATRICIA A. HORGAN
Assistant Attorney General
Office of the Attorney General
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
(860) 808-5250

Counsel of Record

TABLE OF CONTENTS

Table of Authorities ii

Counterstatement of the Case 1

Reasons for Denying the Writ 6

1. THE CONNECTICUT SUPREME COURT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISIONS IN *OYLER*, *ARMSTRONG* AND *WAYTE* 8

2. THE CONNECTICUT SUPREME COURT'S DECISION DOES NOT CONFLICT WITH THE COURTS OF APPEALS DECISIONS WHICH THE PETITIONER CITES 16

Conclusion 20

Appendix A1

TABLE OF AUTHORITIES

Cases:

Bordenkircher v. Hayes,
434 U.S. 357, 98 S.Ct. 663 (1978) 11

Cadlerock Properties Joint Venture, L.P. v. Commissioner of Environmental Protection,
253 Conn. 661, 757 A.2d 1 (2000)
..... 3, 4, 5, 6, 15, 19

Casteneda v. Partida,
430 U.S. 482, (1977) 11

Dartmouth Review v. Dartmouth College,
889 F.2d 13 (1st Cir. 1989) 16, 17

Esmail v. Macrane,
53 F.3d 176 (7th Cir. 1995) 16, 17

Heckler v. Cheney,
470 U.S. 821, 105 S.Ct. 1649, (1985) 9

Klinger v. Department of Corrections,
31 F.3d 727 (8th Cir. 1994) 16, 17, 18

LeClair v. Saunders,
627 F.2d 606, (2d Cir. 1980) 9, 13, 18, 19

Oyler v. Boles,
368 U.S. 448, 82 S. Ct. 501, (1962)
..... 7, 9, 10, 11, 12, 14, 15, 19

Snowden v. Hughes,
321 U.S. 1, 64 S. Ct. 397 (1944) 15

Starr v. Commissioner of Environmental Protection,
226 Conn. 358, 627 A.2d 1296 (1993) 12, 14

United States v. Armstrong,
517 U.S. 456, 116 S. Ct.1480, (1996)
..... 7, 9, 10, 11, 12, 14, 15

United States v. Berrios,
501 F.2d 1207 (2d Cir. 1974) 9

United States v. Goodwin,
457 U.S. 368, 102 S.Ct. 2485 (1982) 11

United States v. Torquato,
602 F.2d 564 (3d Cir. 1979) 19, 20

Wayte v. United States,
470 U.S. 598, 105 S. Ct. 1524, (1985)
..... 8, 9, 10, 11, 12, 15

Constitution:

United States Constitution First Amendment 11

United States Constitution Fifth and Fourteenth Amendments 8

Statutes:

Conn. Gen. Stat. § 22a-6 2
Conn. Gen. Stat. § 22a-225 2
Conn. Gen. Stat. § 22a-424 2
Conn. Gen. Stat. § 22a-432 ..... 2, 12, 14
Conn. Gen. Stat. § 22a-449d 5

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2000

CADLEROCK PROPERTIES JOINT VENTURE, L.P.
Petitioner

v.

COMMISSIONER OF THE CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION AND THE CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

This case is an administrative appeal of a pollution abatement ordered issued by the Connecticut commissioner of environmental protection requiring the petitioner to clean up undeveloped property which it owns in Connecticut.

The petitioner Cadlerock Properties Joint Venture, L.P., an Ohio limited partnership, is the owner of a 335 acre parcel of land known as 392 and 460 Squaw Hollow Road in Ashford and Willington, Connecticut ("the site"). Superior Court Memorandum of Decision ("MOD"), Petitioner's Appendix at A24. The Connecticut commissioner of the department of environmental protection ("commissioner," "DEP") issued an administrative order to the petitioner on August 15, 1997 pursuant to Conn. Gen. Stat. § 22a-6 and his authority under the Connecticut Water Pollution Control Act, specifically Conn. Gen. Stat. § 22a-424[1/] and § 22a-432[2/], and the Solid Waste Management Act, Conn. Gen. Stat. § 22a-225[3/]. MOD, Petitioner's Appendix at A25.

The commissioner's order alleged that the petitioner had created or was maintaining a facility or condition which reasonably can be expected to create a source of pollution to the waters of the state; and further alleged that the petitioner was maintaining a solid waste disposal

---

1/ Appendix at A2
2/ Appendix at A5
3/ Petitioner's Appendix at A85-A86.

facility on the site without a permit. MOD, Petitioner's Appendix at A24. The order required the petitioner to undertake investigatory and remedial actions with regard to portions of the site. *Id.*

DEP and private environmental analysts conducted site investigations between 1991 and 1997 that revealed significant sources of pollution. *Cadlerock Properties Joint Venture, L.P. v. Commissioner of Environmental Protection*, 253 Conn. 661, 665, 757 A.2d 1 (2000). Petitioner's Appendix at A5. The site contains several areas of soil and groundwater contamination and/or solid waste disposal, including the northwest disposal area, south central disposal area, wetlands outside the south central disposal area, the northeast corner of the site, an area north of the south central disposal area, and an area of leachate in wetlands and a pond. MOD, Petitioner's Appendix at A25 to A32.

Benjamin Schilberg previously leased a one-quarter acre area of the site, known as the northwest disposal area, and burned insulated copper wire at that location to recover copper for resale. *Cadlerock*, 253 Conn. at 665. Petitioner's

Appendix at A5. In 1992 he acknowledged to DEP in writing that he had conducted those activities at that location approximately 20 to 25 years earlier. *Id.*, Petitioner's Appendix at A93.

DEP did not issue an order to Benjamin Schilberg. DEP in 1993 tried unsuccessfully to persuade a former owner of the property, Ashford Development Corporation, to voluntarily remediate the site; however DEP did not pursue enforcement action at that time because of a lack of resources. *Id.*, 253 Conn. at 666. Petitioner's Appendix at A6.

Since 1994 Schilberg's son, Bernard Schilberg, has been a member of Connecticut's underground storage tank petroleum clean-up account review board ("UST board"). *Id.*, 253 Conn. at 673-74, note 11. Petitioner's Appendix at A12 to A13. A designee of the commissioner of environmental protection, Richard Barlow, chief of the bureau of waste management, sits on the UST board. Petitioner's Appendix at A147. Bernard Schilberg was appointed to that position, pursuant to Conn. Gen. Stat.

§ 22a-449d[4/], by the former Speaker of the House, a member of the Democratic party. Appendix at A12-A13. The commissioner of environmental protection was appointed to his position by the governor of Connecticut, a member of the Republican party.

In 1996 Cadle Properties of Connecticut, Inc. acquired the site. After unsuccessfully trying to convince Cadle Properties to voluntarily remediate the site, DEP issued an order to Cadle Properties on February 26, 1997. *Cadlerock*, 253 Conn. at 666. Petitioner's Appendix at A6. Upon learning that the property had been transferred to the petitioner, DEP withdrew the order against Cadle Properties and issued an order on August 15, 1997 to the petitioner, a separate entity related to Cadle Properties. *Id.*

Petitioner appealed the order, claiming that the commissioner had engaged in selective enforcement in that he had not issued a pollution abatement order to Benjamin Schilberg. *Id.*, 253 Conn. at 667, Petitioner's Appendix at A7. During the hearing, Elsie Patton, assistant director of the permitting, enforcement and remediation division of the

---

4/ Appendix at A6.

bureau of water management, testified that DEP did not pursue Schilberg because (1) he was responsible only for a portion of the pollution, (2) pursuing Schilberg would not get the entire site cleaned up, and (3) pursuing enforcement both against Schilberg and the petitioner would have delayed remediation of the entire site. *Id.* Both Elsie Patton and Thomas O'Connor, the DEP employees who initiated the administrative order for the commissioner's signature, testified that they were not aware of Bernard Schilberg's position with the UST board and had no contact with him during the time when the order was issued. Final Decision, Petitioner's Appendix at A54, A61 to A63. Petitioner offered no evidence that Bernard Schilberg's position on the UST board or any connections he may have had to DEP officials played any role in DEP's decision not to pursue enforcement action against his father or influenced the commissioner in the exercise of his discretion. *Id.*, Petitioner's Appendix at A63.

On October 23, 1998, the hearing officer issued a final decision affirming Order SRD-088 and rejecting petitioner's defense of selective enforcement. The trial

court affirmed the final decision and dismissed petitioner's appeal on May 5, 1999. The Connecticut Supreme Court affirmed the trial court judgment on July 18, 2000. Petitioner's motion for rehearing en banc was denied September 14, 2000. Petitioner filed this Petition for a Writ of Certiorari to this Court on December 12, 2000.

REASONS FOR DENYING THE WRIT

Certiorari is not warranted in this case because, contrary to the petitioner's assertions, the Connecticut Supreme Court's decision is not inconsistent with decisions of this court in *Oyler v. Boles* or *United States v. Armstrong*. Additionally there is no conflict with decisions of the U.S. Courts of Appeals cited by the petitioner. Given the lack of conflict and the policy of deference to the exercise of enforcement discretion by administrative agencies, the petitioner has not identified any "compelling reasons" for this Court to review the case, and this Court should therefore deny the petition.

1. THE CONNECTICUT SUPREME COURT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISIONS IN *OYLER*, *ARMSTRONG* AND *WAYTE*.

Petitioner's selective enforcement claim is based upon the tenuous premise that a non-polluting owner of contaminated property cannot be held liable for an administrative order to clean up that property so long as a former lessee of a one-quarter acre portion of a 335 acre parcel, who caused a portion of the pollution, does not also receive an administrative order. Petitioner claims that the government's failure to enforce against all parties potentially responsible for pollution on the site constitutes selective enforcement in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

The decision of the Connecticut Supreme Court rejecting this absurd argument does not conflict with any decision of this Court. Moreover, the Connecticut Supreme Court applied the standards created by this Court in *Wayte v. United States*, 470 U.S. 598, 105 S. Ct. 1524 (1985). Stripped of its rhetoric, the petitioner's claim simply

devolves into a claim that the Connecticut Supreme Court misapplied these standards to the facts of this case.

This Court's cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one. *United States v. Armstrong*, 517 U.S. 456, 116 S. Ct.1480, 1486 (1996). The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. *Oyler v. Boles*, 368 U.S. 448, 82 S. Ct. 501, 506 (1962). Lower courts have generally used cases involving the criminal defense of selective prosecution as an analogy to examine cases alleging selective enforcement. See, e.g., *LeClair v. Saunders*, 627 F.2d 606, 609 (2d Cir. 1980), citing *United States v. Berrios*, 501 F.2d 1207 (2d Cir. 1974).

Furthermore, this Court has compared an administrative agency's exercise of enforcement discretion with that of a prosecutor's. *Heckler v. Cheney*, 470 U.S. 821, 832, 105 S. Ct. 1649, 1656 (1985). Courts have established a policy of deference to prosecutorial decisions made by the executive branch in the exercise of its

discretion. See *Wayte v. United States*, 470 U.S. at 607-08, 105 S. Ct. at 1530-31 (1985), *Armstrong*, 517 U.S. at 464, 116 S. Ct. at 1486. "This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review." *Wayte*, 470 U.S. at 607. The presumption of regularity supports prosecutorial decisions enforcing the laws and "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *Armstrong*, 517 U.S. at 464, 116 S. Ct. at 1486. This policy of deference to enforcement discretion is appropriate in this case where an administrative agency, operating with limited resources, made an enforcement decision designed to accomplish the goal of getting an entire 335 acre site cleaned up as quickly as possible.

This Court has stated that it is appropriate to judge selective prosecution claims according to ordinary equal protection standards. *Wayte v. United States*, 470 U.S. at 608, 105 S. Ct. at 1531, citing *Oyler v. Boles*, 368 U.S. 448. These standards require the petitioner to show both that the administrative order at issue had a discriminatory effect and

that it was motivated by a discriminatory purpose. *Wayte*, 470 U.S. at 608.

In *Wayte*, this Court affirmed a Ninth Circuit decision which applied the following selective prosecution standards to determine whether the petitioner had established a prima facie case: (1) the petitioner had to prove that others similarly situated generally had not been prosecuted for conduct similar to petitioner's and (2) the government's discriminatory selection was based on impermissible grounds such as race, religion or exercise of First Amendment rights. *Wayte*, 470 U.S. at 605-06, 105 S. Ct. at 1529-30. This Court further stated that the decision to prosecute may not be "deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification," including the exercise of protected statutory and constitutional rights. *Wayte*, 470 U.S. at 608, 105 S. Ct. at 1531, citing *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663 (1978), *Oyler v. Boles*, 368 U.S. 448, and *United States v. Goodwin*, 457 U.S. 368, 102 S. Ct. 2485 (1982). As in *Wayte*, petitioner here presented no evidence of an enforcement decision based upon an

arbitrary classification such as the exercise of protected statutory and constitutional rights.

This Court rejected the selective prosecution claim made in *Wayte*, as it did in the *Oyler* and *Armstrong* cases. Based upon this Court's decisions, it is clear that the petitioner has not proven that it has been singled out for different treatment in comparison to other similarly situated owners of contaminated property. In Connecticut, a property owner may be required to clean up property that is contaminated regardless of the owner's culpability for causing the pollution. Conn. Gen. Stat. § 22a-432; *Starr v. Commissioner of Environmental Protection*, 226 Conn. 358, 385, 627 A.2d 1296 (1993) (Section 22a-432 was properly applied to make an owner of land subject to liability for correcting a source of pollution regardless of that owner's lack of culpability for causing or creating the pollution.) Petitioner has not alleged that the government did not have authority under Section 22a-432 to issue an order to it as owner of the property.

Petitioner's comparison for purposes of the "similarly situated" requirement is based on faulty logic.

Petitioner did not compare itself to other owners who share commonalties with the petitioner in all relevant respects, i.e., other non-polluting owners of contaminated property in Connecticut. For a claim of selective enforcement, petitioner was required to show that the government has not taken action against other owners whose conduct is of the same type that forms the basis of the charge against the petitioner. *LeClair v. Saunders*, 627 F.2d 606, 609 (2d Cir. 1980), *cert. denied* 450 U.S. 959, 101 S. Ct. 1418 (1981). This the petitioner failed to do.

Petitioner compares itself to a former lessee who admitted responsibility for pollution-causing activities in a one-quarter acre area of the site and to a defunct former owner of the property.[5/] Neither of those parties is similarly situated for purposes of a selective enforcement analysis. Mere failure to prosecute other offenders is not a basis for a finding of denial of equal protection. *LeClair v. Saunders*, 627 F.2d at 608.

5/ Petitioner did not compare itself to its predecessor in title, Cadle Properties, that was issued a pollution abatement order in February 1997. That order was withdrawn six months later when DEP determined that company no longer owned the property.

Petitioner further claims that its alleged unequal treatment becomes a violation of the Equal Protection Clause because issuance of the order constituted arbitrary conduct on the part of the government, motivated presumably by an unspecified political bias. Issuance of a pollution abatement order to the party who has control of the property is a *per se* rational and legitimate exercise of the government's environmental protection obligations. See Conn. Gen. Stat. § 22a-432; *Starr*, 226 Conn. at 395. Nothing in the record supports petitioner's assertion that it was unlawfully targeted for enforcement instead of Schilberg or that it was targeted for enforcement because of Schilberg's son's position on the UST board.

Even if one were to assume, *arguendo*, that the petitioner had been treated selectively, the petitioner failed to prove that such treatment was based upon an unjustifiable standard such as race, religion or other arbitrary classification. *Oyler*, 368 U.S. 448, 456, 82 S. Ct. 501, 506 (1962); *Armstrong*, 517 U.S. at 464, 116 S. Ct. at 1486. An allegation of discrimination which is not based upon an unjustifiable classification must be proved by

showing a malicious or bad faith intent to injure the petitioner as discussed in *Snowden v. Hughes*, 321 U.S. 1, 64 S. Ct. 397 (1944) and its progeny. There is no evidence that issuance of the order to the petitioner was based either upon an unjustifiable standard or upon a malicious or bad faith intent to injure the petitioner. As stated by the Connecticut Supreme Court, the evidence does not support a conclusion that DEP declined to pursue enforcement actions against Schilberg because of a malicious or bad faith intent to injure the petitioner. *Cadlerock*, 253 Conn. at 672-672, note 11. Petitioner's Appendix at A12-A13. The Connecticut Supreme Court agreed with the hearing officer's findings that DEP's intention was to remediate efficiently the pollution on the site and, therefore, there was no evidence of a malicious or bad faith intent toward the petitioner. *Id.*

For all these reasons, this Court should find that the Connecticut Supreme Court's decision conformed in all necessary respects to the principles enunciated in *Oyler*, *Armstrong* and *Wayte*. On this basis, the petition should be denied.

2. THE CONNECTICUT SUPREME COURT'S DECISION DOES NOT CONFLICT WITH THE COURTS OF APPEALS DECISIONS WHICH THE PETITIONER CITES.

Petitioner claims that the Connecticut Supreme Court's analysis of the "similarly situated" requirement is in conflict with decisions of the First, Seventh and Eighth Circuits in *Dartmouth Review v. Dartmouth College*, 889 F.2d 13 (1st Cir. 1989); *Esmail v. Macrane*, 53 F.3d 176, (7th Cir. 1995); and *Klinger v. Department of Corrections*, 31 F.3d 727 (8th Cir.1994). The standards enunciated in those decisions do not differ significantly from one another. Nor does the Connecticut Supreme Court decision at issue here conflict with the standards in those decisions.

The court in the *Dartmouth College* case, examined the "similarly situated" requirement for an equal protection claim involving alleged racial discrimination against students at a college newspaper. The court characterized the appellant's obligation to identify and relate specific instances where persons situated similarly in all relevant aspects were treated differently. *Dartmouth Review*, 889 F.2d at 19. The test used by the court was further explained

as "whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated. *Id.* Nothing in the standards set forth in that case conflicts with the Connecticut Supreme Court decision.

The *Esmail* decision stands, not on the "similarly situated" requirement, but on a finding that the unequal treatment of the plaintiff was the result of "an orchestrated campaign of official harassment directed against him out of sheer malice." *Esmail*, 53 F.3d at 179. Petitioner here does not claim that it is the victim of an orchestrated campaign of official harassment. Nothing in *Esmail* is in conflict with the Connecticut Supreme Court decision. In fact the *Esmail* court states that while failure to prosecute all known lawbreakers may result in unequal treatment, that form of selective prosecution has no standing in equal protection law. *Esmail*, 53 F.3d at 178-79.

The *Klinger* decision likewise does not conflict with the Connecticut Supreme Court decision. *Klinger* involves a claim of denial of equal protection by female prisoners with regard to programs and resources available at men's

prison facilities but not at the women's prison. The "similarly situated" inquiry, as stated by that court, "focuses on whether the plaintiffs are similarly situated to another group for purposes of the challenged government action." *Klinger*, 31 F.3d at 731. The "similarly situated" test used by the Connecticut Supreme Court conforms to that advanced by the *Klinger* court. The *Klinger* court, noting that the Equal Protection Clause generally requires the government to treat similarly situated persons alike, also noted that "[d]issimilar treatment of dissimilarly situated persons does not violate equal protection." *Id.* In this case, the hearing officer, the trial court and the Connecticut Supreme Court found that a former lessee and a defunct former owner of the property were not similarly situated to the petitioner.

Nothing in the decisions cited by petitioner on the "similarly situated" requirement conflicts with the analysis and decision of the Connecticut Supreme Court.

Petitioner further claims that the Connecticut Supreme Court's analysis of the second prong of the selective enforcement claim is in conflict with decisions of

the Second and Third Circuits in *LeClair v. Saunders*, 627 F.2d 606 (2d Cir. 1980), *cert. denied* 450 U.S. 959, 101 S. Ct. 1418 (1981) and *United States v. Torquato*, 602 F.2d 564 (3d Cir. 1979).

Petitioner failed to fulfill its burden of presenting evidence showing that, even if the first prong was satisfied, the government action was based upon an "unjustifiable standard such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *LeClair*, 627 F.2d at 609-10. See *Cadlerock*, 253 Conn. 672-73, note 11, Petitioner's Appendix at A12-A13. The Connecticut Supreme Court decision does not conflict with the *LeClair* decision.

The *Torquato* court examined the prosecutorial decisions made in that case on the basis of the defendant's membership in a political party as the sort of "arbitrary classification" contemplated by *Oyler v. Boles*, *supra*. It also stated that the defendant could raise his claim of selective prosecution based upon individual discrimination. *United States v. Torquato*, 602 F.2d 564, 569, note 9

(1979). In that case, however, the defendant's burden of showing that the government intentionally and purposefully discriminated against him by failing to prosecute other similarly situated persons was not met. *Id.*, 602 F.2d at 570. Petitioner here claims the DEP's enforcement order was based upon some unspecified "political bias," but offered no evidence to connect DEP's decision to issue an order to petitioner to any contact which Schilberg's son may have had with members of DEP's bureau of waste management or as a result of his position on the UST board. The decision of the Connecticut Supreme Court in this case does not conflict with the standards set forth by the *Torquato* court.

As discussed above, the decision of the Connecticut Supreme Court does not conflict with the standards set forth in the Courts of Appeals decisions cited by the petitioner.

CONCLUSION

For all of the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

RESPONDENT
ARTHUR J. ROCQUE, JR.
COMMISSIONER OF THE
DEPARTMENT OF
ENVIRONMENTAL
PROTECTION OF THE
STATE OF CONNECTICUT

RICHARD BLUMENTHAL
ATTORNEY GENERAL

*Patricia A. Horgan
Assistant Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
Tel. No. (860) 808-5250

*Counsel of Record

No. 00-974

In The

Supreme Court Of The United States

October Term, 2000

CADLEROCK PROPERTIES JOINT VENTURE, L.P.,

Petitioner

v.

COMMISSIONER OF THE CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION AND THE CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

APPENDIX

APPENDIX TABLE OF CONTENTS

Conn. Gen. Stat. § 22a-424 ..... A2

Conn. Gen. Stat. § 22a-432 ..... A5

Conn. Gen. Stat. § 22a-449d A6

Transcript: Testimony of
Bernard Schilberg, December 3, 1997 ..... A8

Conn. Gen. Stat. Sec. 22a-424. (Formerly Sec. 25-54c).

Powers and duties of commissioner. The commissioner shall have the following powers and duties:

(a) To exercise general supervision of the administration and enforcement of this chapter;

(b) To develop comprehensive programs for the prevention, control and abatement of new or existing pollution of the waters of the state;

(c) To advise, consult and cooperate with other agencies of the state, the federal government, other states and interstate agencies and with affected groups, political subdivisions and industries in furtherance of the purposes of this chapter. Such powers and duties shall include receiving information provided by the United States Environmental Protection Agency, which if subject to a claim of confidentiality pursuant to the federal Freedom of Information Act of 1976 (5 USC 552) and regulations adopted thereunder, shall be kept confidential by the commissioner notwithstanding any of the provisions of section 1-210 to the contrary;

(d) To submit plans for the prevention and control of water pollution and to render reports and accounts to the Administrator of the Environmental Protection Agency any to any other federal officer or agency on such forms containing such information as the said Administrator or any other officer or federal agency, may reasonably require, in order to qualify the state and its municipalities for grants from the United States government;

(e) To encourage, participate in or conduct studies, investigations, research and demonstrations, and collect and disseminate information, relating to water pollution and the causes, prevention, control and abatement thereof;

(f) To issue, modify or revoke orders prohibiting or abating pollution of the waters of the state, or requiring the construction, modification, extension or alteration of pollution abatement facilities or monitoring systems, or any parts thereof, or adopting such other remedial measures as are necessary to prevent, control or abate pollution;

(g) To hold such hearings as may be required under the provisions of this chapter and the federal Water Pollution Control Act or other applicable federal law, for which he shall have the power to issue notices by certified mail, administer oaths, take testimony and subpoena witnesses and evidence;

(h) To require the submission of plans, specifications and other necessary data for, and inspect the construction of, pollution abatement facilities and monitoring or disposal systems in connection with the issuance of such permits or approvals as may be required by this chapter and the federal Water Pollution Control Act;

(i) To issue, continue in effect, revoke, transfer, modify or deny permits, under such conditions as he may prescribe, for the discharge of any water, substance or material into the waters of the state, or orders for or approval of the installation, modification or operation of pollution abatement facilities or monitoring systems;

(j) To require proper maintenance and operation of monitoring and disposal systems;

(k) To exercise all incidental powers necessary to carry out the purposes of this chapter and the federal Water Pollution Control Act;

(l) To adopt regulations in accordance with the provisions of chapter 54 to implement this chapter and to comply with the federal Water Pollution Control Act and the federal Safe Drinking Water act;

(m) Either on his own initiative or upon complaint, to investigate or order the person who caused or reasonably may be expected to cause the pollution to investigate all points of existing or potential waste discharge which may directly or indirectly result in pollution of the waters of the state provided upon written complaint by the Commissioner of Public Health, the chief executive officer of a municipality, the warden or any of the burgesses of a borough, a committeeman of a fire district or a local or district director of health, the commissioner shall investigate or order the person who caused or reasonably may be expected to cause the pollution to investigate all points of existing or potential waste discharges which may directly or indirectly result in pollution of the waters of the state.

Conn. Gen. Stat. Sec. 22a-432. (Formerly Sec. 25-54k). Order to correct potential sources of pollution.

If the commissioner finds that any person has established a facility or created a condition before or after June 25, 1985, or is maintaining any facility or condition which reasonably can be expected to create a source of pollution to the waters of the state, he may issue an order to such person to take the necessary steps to correct such potential source of pollution. Any person who receives an order pursuant to this section shall have the right to a hearing and an appeal in the same manner as is provided in sections 22a-436 and 22a-437. If the commissioner finds that the recipient of any such order fails to comply therewith, he may request the Attorney General to bring an action in the superior court for the judicial district of Hartford enjoin such person from maintaining such potential source of pollution to the waters of the state or to take the necessary steps to correct such potential source of pollution. All actions brought by the Attorney General pursuant to the provisions of this section shall have precedence in the order of trial as provided in section 52-191. An innocent landowner, as defined in section 22a-452d, shall not be held liable, except through imposition of a lien against the contaminated real estate under section 22a-452a, for any order issued under this section on or before August 1, 1990, which order is subject to appeal as of July 6, 1995, and, after July 1, 1996, for any order issued under this section after July 1, 1996.

Conn. Gen. Stat. Sec. 22a-449d. Underground Storage Tank Petroleum Clean-Up Account Review Board.

(a) There is established an Underground Storage Tank Petroleum Clean-Up Account Review Board to review applications for reimbursements and payments from the account established under section 22a-449c. Upon application for reimbursement or payment pursuant to section 22a-449f, the board shall determine if a release occurred and damage resulted from such release and the amount of any such damage. The board shall have the authority to hold hearings, administer oaths, subpoena witnesses and documents through its chairperson when authorized by the board; designate an agent to perform such duties of the board as it deems necessary except the duty to render a final decision to order reimbursement or payment from the account; and provide by notice, printed on any form, that any false statement made thereof or pursuant thereto is punishable pursuant to section 53a-157b.

(b) The board shall consist of the Commissioners of Environmental Protection and Revenue Services, the Secretary of the Office of Policy and Management and the State Fire Marshal, or their designees; one member representing the Connecticut Petroleum Council, appointed by the speaker of the House of Representatives; one member representing the Service Station Dealers Association, appointed by the majority leader of the Senate; one member of the public, appointed by the majority leader of the House of Representatives; one member representing the Independent Connecticut Petroleum Association, appointed by the president pro tempore of the Senate; one member representing the Connecticut Gasoline Retailers Association, appointed by the minority leader of the House of Representatives; one member representing a municipality with a population greater than one hundred thousand, appointed by the Governor; one member representing a municipality with a population of less than one hundred thousand, appointed by

the minority leader of the Senate; one member representing a small manufacturing company which employs fewer than seventy-five persons, appointed by the speaker of the House of Representatives and one member experienced in the delivery, installation, and removal of residential underground petroleum storage tanks and remediation of contamination from such tanks, appointed by the president pro tempore of the Senate. The board shall annually elect one of its members to serve as chairperson.

STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION

STATE OF CONNECTICUT Claimant vs. CADLEROCK PROPERTIES JOINT VENTURE, L.P. Respondent	Order No. 88 December 3, 1997 Volume III

Before: DONALD H. LEVENSON, HEARING OFFICER

Appearances:

FOR THE CLAIMANT:

STATE OF CONNECTICUT
OFFICE OF ATTORNEY GENERAL
55 Elm Street
Hartford, Connecticut 06106-1774
By: PATRICIA A. HORGAN
ASSISTANT ATTORNEY GENERAL

FOR THE RESPONDENT:

SABIA & HARTLEY, LLC
100 Constitution Plaza, Suite 600
Hartford, Connecticut 06103-1707
By: JILL HARTLEY, ATTORNEY

MS. HARTLEY: No follow-up.

HEARING OFFICER LEVENSON: Okay. Thank you, sir.

(Whereupon, the witness was excused.)

MS. HARTLEY: I guess pursuant to our efforts to accommodate everyone's schedule, I'll be calling Bernard Schilberg.

HEARING OFFICER LEVENSON: Off the record.

(Off the record discussion.)

HEARING OFFICER LEVENSON: Back on the record. And we're going to go out of order of our cases to accommodate some nonparty witnesses.

MS. HARTLEY: I call Bernard Schilberg.

BERNARD SCHILBERG

having been called as a witness, was first duly sworn and testified on his oath as follows:

HEARING OFFICER LEVENSON: Could you state and spell your name for the record?

THE WITNESS: My name is Bernard C. Schilberg, S-C-H-I-L-B-E-R-G. My address is 15 Wildwood Circle, South Windsor, Connecticut 06074.

DIRECT EXAMINATION

BY MS. HARTLEY:

Q Mr. Schilberg, you're here today under subpoena, is that correct?

A That's correct.

Q And you received the subpoena from Cadlerock Properties Joint Venture, L.P.?

A That's correct.

Q Okay. And you're aware that that subpoena required you to bring certain documents with you?

A That's correct.

Q Okay.

HEARING OFFICER LEVENSON: What was your middle initial?

THE WITNESS: C.

HEARING OFFICER LEVENSON: And is that the same middle initial as your father?

THE WITNESS: Yes, it is.

HEARING OFFICER LEVENSON: And it's

yourself, Pat and Tom.

Q Okay. So, the only times that you've spoken with Mr. O'Connor was the time when you had the meeting five years ago and the conference call that you just referred to?

A That's correct.

Q And then shortly before your testimony here today?

A That's correct.

Q Okay. You're a member of the Underground Storage Tank Petroleum Cleanup Account Review Board?

A That's correct.

Q If I refer to that entity as the board, will you know what I mean?

A I will.

Q When did you become a member of the board?

A Approximately three years ago.

Q So that would have been some time in 1994?

A I don't recall exactly, but that sounds about right.

Q Okay. And were you appointed to that position?

A Yes, I was.

Q Okay. And you were appointed by the speaker

of the house?

A That's correct.

Q And at the time that was Thomas Ritter?

A That's also correct.

Q How did you come to be considered for an appointment to the board?

A I had known Tom through a -- what it was, they were trying to put an incinerator in Willimantic to clean up the soil, the soil that was petroleum contaminated. And he found out what type of business we were in, and knowing my environmental background associated with the business, he felt as though I would be an asset to the review board.

Q When you say they were trying to clean up soil in Willimantic, who are you referring to?

A There was a company in Willimantic called United Abrasives who owned a piece of property in Willimantic that used to be the incinerator to burn

solid waste in Willimantic, and I was a friend of the owner of United Abrasives and he had consulted with me as far as the feasibility of this type of process, and that's how I had met with Mr. Ritter, through their negotiations.

Q So in other words, your name was given by

A That's correct.

Q Okay. Do you know anyone with the DEP?

A Do I know anybody?

Q Uh-huh.

A Well, through my company I've met many people in the DEP.

Q Okay. Who have you met at the DEP through your company?

A It's been a while, Robin Bray, I know Richard Barlow through the UST or the board, Patricia Gray. Primarily, that's it, other than the people that serve as staff to the Underground Storage Tank Board.

Q All right. And Robin Bray, she's in what division of the DEP?

A Solid waste.

Q And then you referred to certain individuals who are staff to the board?

A That's correct.

Q Okay.

A I didn't mention any of them. I just said there's various staff to the board.

Q Okay. Can you recall any specific names of any of those individuals?

A Jacques Gilbert. I don't recall the rest of

department of the DEP the staff to the board work in

A No, I don't.

Q Okay. Do you know whether or not they're part of the Bureau of Water Management?

A I think I just answered I didn't know, so --

Q Okay. Have you, yourself, had dealings with individuals in the Bureau of Waste Management?

A Yes, I have.

Q Okay. And with whom have you dealt?

A I think I mentioned that also, Patricia Gray and Robin Bray.

Q When you were appointed to the board, were you appointed as a representative of a small manufacturing company which employs fewer than seventy-five persons?

A That's correct.

Q I know you touched upon this, but I want to make sure we cover it in enough detail. The board makes

determinations regarding whether or not to reimburse someone for costs of a release, correct?

A That's correct, costs associated with that release, that's correct.

Q Okay. The board actually gets recommendations from the DEP with regard to what they

CERTIFICATE

STATE OF CONNECTICUT)
) ss.
COUNTY OF HARTFORD)

I, LISA GRAZIANO, a Notary Public in and for the State of Connecticut, do hereby certify that the foregoing record is a correct and verbatim computer aided transcription of the proceeding hereinbefore set forth.

I further certify that I am neither counsel for, nor related to, nor employed by any of the parties to the action in which this proceeding is taken; and further certify I am not related to, nor an employee of any attorney or representative employed by the parties thereto, nor am I financially interested in this action.

I witness whereof I have hereunto set my hand, and affixed my notarial seal this date, December 3, 1997.

LISA GRAZIANO
NOTARY PUBLIC

My commission expires June 30, 2001.

POST REPORTING SERVICE
HAMDEN, CT (800) 262-4102